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No. 92-1906

In the Supreme Court

OF THE

United States

October Term, 1992

THE HARDAWAY COMPANY,
Petitioner,
vs.
UNITED STATES, DEPARTMENT OF THE ARMY,
CORPS OF ENGINEERS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Federal Tort Claims Act gives rise to a cause of action against the government in favor of parties that rely to their detriment on the government to perform an express duty in a non-negligent manner.

* * *

Whether government conduct mandated by federal statutes is, *ipso facto,* conduct that is "uniquely governmental" and insulated from review under the Federal Tort Claims Act.

PARTIES TO THE PROCEEDING BELOW

The parties to these proceedings are set forth in the caption.

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OFFICIAL AND UNOFFICIAL REPORTS AND OPINIONS INVOLVED

The decision and order of the district court dated April 19, 1991, granting the United States motion to dismiss is unpublished. (Pet. App. "A").

The decision of the United States Court of Appeals for the Eleventh Circuit, dated January 13, 1993, affirming the decision of the district court is reported at 980 F.2d 1415. (Pet. App. "B").

The order of the United States Court of Appeals for the Eleventh Circuit dated February 25, 1993, denying petitioner's motion for rehearing, has not been published. (Pet. App. "C").

BASIS FOR JURISDICTION

The Supreme Court's jurisdiction is predicated upon 28 U.S.C § 1254 (1993) and Rule 10 (a) & (c) of the Rules of the Supreme Court of the United States, on the grounds that several circuit courts of appeal have decided this question in a way that conflicts with applicable decisions of this Court and there is a conflict between the circuits on this question. The Circuit Court of Appeals dismissed this action on January 13, 1993. Hardaway's petition for rehearing was denied in February 25, 1993.

THE STATUTES AND REGULATIONS INVOLVED

This action involves the interpretation of the Federal Tort Claims Act, 28 U.S.C. §§ 1346 & 2671 *et seq* ("FTCA") and the Miller Act 40 U.S.C. § 270a (1986). *See* App. "D" & "E".

This action also involves the interpretation of a regulation in effect at the time of the relevant contract. 48 C.F.R. §28-202-2(a) (1986) (repealed) provided, in pertinent part:

> Individual Sureties are acceptable for all types of bonds except position schedule bonds. The contracting officer shall determine the acceptability of individuals proposed as sureties. At least two individual sureties must execute the bond and the net worth of each individual surety must equal or exceed [the] penal amount of the bond. Contracting officers shall consider the number and amounts of other bonds upon which a proposed individual surety is bound, and the status of the contracts for which such bonds were furnished, in determining the acceptability of the individual surety . . . .

STATEMENT OF THE CASE

A. Federal Jurisdictional Predicate

Federal jurisdiction in this action is predicated upon 28 U.S.C. § 1346 and 28 U.S.C. §§ 2671 *et seq*, as a civil action arising out of the Federal Torts Claim Act.

B. Statement of Facts Relevant to the Petition

This action was dismissed before discovery or trial. All allegations must be construed in the light most favorable to the petitioner.

This case involves claims for negligence arising out of the United States, Department of the Army, Corps of Engineers ("the Corps") administration of a contract. C. Ardavin Construction, Inc. ("Ardavin"), a minority contractor, was the prime contractor on a government project for the construction of roads at MacDill Air Force Base, Tampa, Florida. The Hardaway Company ("Hardaway") entered into the subcontract with Ardavin on January 14, 1988. (R2-Ex."E").[1]

Under the terms of the Miller Act, Ardavin was required to post performance and payment bonds for the protection of subcontractors, such as Hardaway, that are unable, in this and all federal projects, to lien the project in the event of non-payment. Pursuant to the Miller Act, these bonds must be in place prior to the government's award of the contract to the general contractor. 40 U.S.C. § 270a(a).

Ardavin contacted Hardaway and asked it to perform paving work on the project as a subcontractor. Due to concerns about the financial viability of Ardavin, in order to protect itself from any potential forfeiture, and prior to entering into its subcontract with

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1 Hardaway's parent is the Lampton Company. Hardaway has no other parents or affiliates.

For the convenience of the Court, should the record on appeal be requested, references to the original record on appeal are provided throughout.

Ardavin, Hardaway asked the Corps if proper Miller Act bonds were in place. Mr. Leonard B. Harris, the Corps on-site engineer, advised Hardaway that bonds were in place and had been approved by the Corps. (R.2-Ex."E"). At that time two individual sureties, Peter Harris and Quida J. Trahan, M.D. had been approved by the Corps. (R.2-5). Individual non-traditional sureties were permitted pursuant to the Federal Acquisition Regulations ("FARs"), provided the Corps' contracting officer had made a determination that these sureties were "acceptable" by determining that each surety had an *individual* net worth in excess of the penal sum of the bond *and,* after reviewing such items as the sureties' net worth, other bonds, and the status of the contracts for which these bonds were posted. *See* 48 C.F.R. § 28.202 (1986).

However, the Corps' regulation-required determination that these sureties were acceptable was severely insufficient, if not non-existent, based upon nothing more than affidavits from these individuals avowing that they met the requirements of 48 C.F.R. § 28.202 (1986). (R2-Exs. "A" & "B"). No investigation was ever performed by the contracting officer. In what proved to be false affidavits, these sureties represented that they had assets in excess of $18 million. Even the most cursory investigation of these individuals would have revealed that they had little or no assets whatsoever, let alone the amounts represented in the affidavits.[2]

In reliance on the government's approval and apparent compliance with the FARs, Hardaway entered into the subcontract with Ardavin. Hardaway performed its work under the subcontract, including additional work requested by Ardavin and the Corps. Hardaway's work was accepted by the Corps and is currently in use. When Hardaway sought payment for the work, Ardavin defaulted,

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2 Harris' affidavit listed his net worth as $6,503,250 (R. 2 - Ex. "A") and Trahan listed her net worth as $11,848,200. (R. 2 - Ex. "B"). On July 30, 1986, Harris and Trahan issued separate payment bonds in the penal amount of $1,295,105.32 (R. 2 - Exs. "C" and "D") and separate performance bonds in the amount of $2,590,210.65 (R. 2 - Exs. "C" and "D"). In litigation discovery, neither surety could be found, absolutely no assets were located. Indeed, even the bank that purportedly "certified" Harris and Trahan's net worth was out of business and under investigation by the FBI and the Attorney General of Tennessee.

leaving $255,366.95 owing to Hardaway. (R2- Ex. "F"). Hardaway first asked the Corps to withhold payment from Ardavin to cover the default. The Corps refused, advising Hardaway that its only recourse was the Miller Act. (R2-Ex."I"). Hardaway then pursued an action against the two individual sureties. Those individuals defaulted and Hardaway was awarded a judgment against them, which has proven uncollectable.[3] In fact, despite arduous efforts, Hardaway was unable to locate either of the individuals or a penny of their assets. (R2-6-7). After exhausting its administrative remedies pursuant to 28 U.S.C. § 1346 & 2675(a), Hardaway filed its complaint against the Corps for negligence under the FTCA. (R.2).

Hardaway, alleged in its amended complaint that the Corps negligently carried out its statutory and common law duties to make a pre-acceptance determination that Ardavin's two individual sureties had sufficient net worth and otherwise satisfied the FAR requirements.[4]

OPINIONS BELOW

On April 11, 1991, the Middle District of Florida (per Hon. William J. Castagna) issued an Order granting the Corps' motion to dismiss. (App. "A"). On May 9, 1991, Hardaway filed its notice of appeal of the District Court's Order.

The United States Court of Appeals affirmed the decision of the district court by decision dated January 13, 1993. (App. "B").

Hardaway's Petition for rehearing was denied by the Eleventh Circuit on February 25, 1993. (App. "C").

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3 United States of America f/u/b/o The Hardaway Company v. Peter Harris and Quida Trahan, Case No. 88-1134-CIV-T-10A (M.D. Fla.).

4 As set forth previously, at the time of the subcontract the pertinent FAR required the government contracting officer "to determine the acceptability of individuals proposed as sureties," whenever such sureties were offered by contractors on government projects. *See* 48 C.F.R. § 28.202 (1986). Under this regulation the Corps was obligated to determine that each individual surety had net worth in excess of $3,885,210.00 to secure the payment bonds in the amount of $1,295,000.00 and the performance bonds in the amount of $2,590,210.00.

SUMMARY OF ARGUMENT

Of all the parties involved with this loss, Hardaway, by any objective standard, is without fault. It was the government's obligation under the Federal Acquisition Regulations to make a determination that these sureties have the financial capacity to post bonds of this magnitude for the precise purpose of preventing this type of forfeiture. This determination was clearly an operational responsibility, not a policy-making or discretion-driven activity.

Hardaway took the initiative of contacting the Corps to confirm that proper bonds were in place, although it had no obligation to do so. Only upon receiving confirmation from the Corps that proper Miller Acts bonds were in place, did Hardaway proceed to enter into the subcontract with Ardavin.

The court below characterized Hardaway's argument as "perverse." It held that the government cannot be held liable for the negligence of its agents' determinations of surety acceptability because, under the Eleventh Circuit's law, the government is purportedly not responsible for failing to ensure that bonds are even in place. However, there is a big distinction; government agents are not free to carry out their duties carelessly when this performance is known to be critical to a subcontractor's welfare. In any event, Eleventh Circuit law with respect to ensuring that bonds are in place is severely flawed, as it is based upon the same syllogistic analysis that this Court, implicitly, and the Seventh Circuit, expressly, rejected.

Hardaway relied upon the Corps' determination and approval of the sureties, only to discover that the Corps had not, in fact, followed the mandate of the regulation in effect at the time, which set forth specific criteria for the sureties' approval. In sum, having done everything within its power to protect itself before entering into the subcontract with Ardavin, Hardaway remains uncompensated for the work it performed.

Pursuant to the Miller Act, Hardaway's remedies were against Ardavin and the non-existent sureties, which it pursued in vain. Had the Corps performed a proper investigation, these individual sureties would not have been permitted to bond the project.

The Corps' negligence in the performance of this task, a task performed for the benefit of subcontractors like Hardaway, that would rely on this performance to their possible detriment, should form the basis for an action under the Federal Torts Claim Act.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE WHETHER THE GOVERNMENT'S BREACH OF AN EXPRESS DUTY THAT INDUCES DETRIMENTAL RELIANCE GIVES RISE TO AN ACTION UNDER THE FEDERAL TORTS CLAIM ACT

This dispute involves the question of whether the government can escape liability for its negligence under the FTCA for its negligent failure to carry out duties it assumes, knowing that private citizens will rely on the performance. In this particular case, the government's duty was to make a determination that individual sureties had the financial capacity to post bonds on a construction contract. Hardaway relied on the government to perform this duty non-negligently only to forfeit payment, for all intents and purposes, when these sureties proved to be non-existent.

As this case now stands, Hardaway, having relied upon the assurances given by the Corps that acceptable[5] sureties were in place *prior* to entering into a subcontract with Ardavin, remains uncompensated for the bulk of the work it performed under the subcontracts because the Corps did not do its job. Hardaway's forfeiture is attributable to its reliance upon the Corps' determination that the individual sureties met the regulatory standards for acceptability - a state of fact that Hardaway confirmed with the Corps.

The FTCA legislates a waiver of sovereign immunity "for money damages . . . caused by the negligent or wrongful act or

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5 The FAR provided a non-exhaustive list of the criteria to be considered in determining "acceptability." These items include net worth, previous and current bonds, and the status of projects bonded by the individual sureties. *See* 48 C.F.R. § 28-202-2(a) (1986).

omission of an employee of the government . . . under circumstances where the United States, if a private person, would be liable to the claimant . . . ." 28 U.S.C. § 1346 (b), in pertinent part.

In the case *sub judice*, in addition to any common law duties, a specific regulation required the Corps to determine the acceptability of individuals as sureties. This determination is of paramount importance in actions under the Miller Act, where the bond is the sole protection afforded a subcontractor in the event of the general contractor's default. The importance of adequate Miller Act bonds was unquestionably known to the Corps in this case.[6]

In the seminal decision of *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), this Court upheld FTCA jurisdiction for a tugboat owner's claims that the Coast Guard caused the grounding of his tug by its *negligent inspection* of a lighthouse.[7] The Coast Guard argued that, "[The FTCA] must be read as excluding liability in the performance of activities private persons do not perform. Thus there would be no liability for negligent performance of 'uniquely governmental functions'." 350 U.S. at 64. In *rejecting* this argument, this Court held:

> While the area of liability is circumscribed by certain provisions of the [FTCA], all government activity is inescapably "uniquely governmental" in that it is performed by the government. . . . [I]t is hard to think of any governmental activity on the "operational level," . . . which is "uniquely governmental," in the sense that its kind has not at

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6 The acknowledged purpose of the Miller Act is to protect materialmen and subcontractors from a general contractor's default. As evidence of this, when Hardaway informed the government of Ardavin's default and asked the government to withhold payment, the contracting officer at MacDill sent Hardaway a pre-printed information packet on the Miller Act, confirming his knowledge of (i) the Miller Act and (ii) the importance of the payment bonds. (R.2 - Ex. I).

7 350 U.S. at 62. The owner alleged that Coast Guard should have discovered that the light was not functioning, and then negligently failed to warn the navigating public about the non-functioning light.

> one time or another been, or could not conceivably be, privately performed.
>
> There is nothing in the [FTCA] which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation. The statute was the product of nearly thirty years of congressional consideration and was drawn with numerous substantive limitations and administrative safeguards. . . . The language of the statute does not support the government's argument.

Id.

Some circuit courts have carved an exception to the clear rule of *Indian Towing* in cases involving the Miller Act. This exception was first announced in *United States v. Smith*, 324 F.2d 622 (5th Cir. 1963), and was the linchpin of the Eleventh Circuit's ruling in this action. As set forth in detail below, *Smith* and the several cases since relying on it, have ruled that a private person could not conceivably be asked to post a Miller Act bond and, therefore (applying logic of the type expressly rejected in *Indian Towing*) the government could not be held liable when it failed to assure that proper bonding was in place.

In *Smith*, the general contractor failed to obtain the required Miller Act bond. Thereafter, the unpaid subcontractor brought an action against the government for failing to require the bond prior to awarding the contract. Section 270a(a) of the Miller Act requires that a contractor furnish a bond before any contract in excess of $25,000 is awarded. *See* 40 U.S.C. § 270a(a). While Section 270a(a) places the responsibility of obtaining the bonds on the general contractor, it contains an additional concomitant duty on the part of the government *not to award a contract until the required bonds are in place. See* 40 U.S.C. § 270a(a) (1986). This duty was ignored by the Fifth Circuit in *Smith*.

The *Smith* court, while recognizing this argument, side-stepped the issue by holding:

> The existence or nonexistence of a claim by a laborer or materialman under a government contract depends entirely upon a Federal statute. There being no possibility of such a situation being construed by state law, the attempt to vindicate such right, it seems clear, cannot bring it within the ambit of tort law claims law language which says in effect that the United States may be sued for certain negligent conduct if such negligent conduct perpetrated by a private person would give rise to a claim under state law. The nature of the claim sought by the claimant here is simply not one which would be asserted against "a private person" under the laws of the State of Georgia.

Smith, 324 F.2d at 625.

This opinion flies directly in the face of logic and the holding of *Indian Towing* that such a bootstrap argument draws distinctions too finespun and capricious to operate as impediments to relief.

Rather than directly address the pertinent issue of whether the Miller Act itself places a duty on the government to ascertain that a bond is in place prior to awarding the contract, the Eleventh Circuit and the *Smith* court relied on this circular argument of analogous state conduct. Relying on *Smith*, the Eleventh Circuit held that there could be no liability under the Federal Torts Claim Act, as there could be no analogous state cause of action predicated upon the Miller Act: "Because there is no analogous private right of action for failing to investigate a surety on a Miller Act Bond, Hardaway cannot maintain an action against the Corps under the FTCA." *Hardaway v. U.S. Army Corps of Engineers*, 980 F.2d 1415, 1416-17 (11th Cir. 1993). As a result of this threshold determination, the Eleventh Circuit did not even address Hardaway's contention that Florida law provides a remedy.[8] In addition, the Eleventh Circuit never reached Hardaway's

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[8] Hardaway contends that Florida would recognize a cause of action pursuant to theories of negligence *per se*, common law breach of duty, common law failure to perform a duty in a non-negligent manner, and/or Florida's Good Samaritan Doctrine.

argument that the government assumed a duty to make its determination pursuant to the express terms of the FAR and is liable to those that detrimentally rely on this determination.

As discussed, the Eleventh Circuit's rationale has already been rejected by this Court in *Indian Towing*, which recognized that there is no uniquely governmental function exception under the FTCA. If we take the argument of the Fifth Circuit in *Smith* and the Eleventh Circuit in the instant action to their logical extreme, both the FTCA and the Miller Act would be completely emasculated. In the case of the FTCA, under *Smith's* logic, no claim could be effectively pursued against the government, as there would never be any government action that was not - by its very nature as the action of a governmental body, officer, or employee - uniquely governmental. With regard to the Miller Act, the very purpose of the bonding requirements are meaningless if a contracting officer is free to "discharge" his duties so carelessly as to freely award a contract with no bonds in place (*Smith*) or fail entirely to determine the adequacy of the sureties notwithstanding its express duty to do so (this case).

In holding that the case *sub judice* was indistinguishable from *Smith* and its progeny, the court below held: "*Smith* establishes that the government cannot be held liable under the FTCA when no bond exists. It would be perverse to hold that the government can be liable when a bond does exist, but proves to be inadequate." *Hardaway*, 980 F.2d at 1417. The Eleventh Circuit, just as the court in *Smith*, never addressed the issue of whether the Miller Act places a duty upon the government to determine that proper bonds are in place prior to awarding the contract. The case for imposing liability against the government in this action is particularly compelling, as Hardaway was only depending on the Corps to follow its own regulations. Much like the case of Coast Guard's lighthouse inspection in *Indian Towing*, Hardaway was relying on nothing more then the contracting officer's non-negligent performance of his duty. In dismissing this case on the Corps' motion to dismiss, Hardaway has been denied any opportunity to prove such elements as the extent of the Corps' duty under the regulation and the forseeability of reliance by subcontractor like

Hardaway. A motion to dismiss for failure to state a claim should not be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts that would entitle it to relief. *See Conley v. Gibson*, 355 U.S. 41 (1955).[9]

There is a conflict amongst the circuits on this issue. Although holding that the government was not liable for the contractor's failure to acquire a Miller Act bond on alternative grounds, the Seventh Circuit in *Arvanis v. Noslo Eng'g Consultants, Inc.*, 739 F.2d 1287 (7th Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985), recognized that the *Smith* governmental function exception was a logically flawed, self-fulfilling prophecy. That Court noted that *Smith*'s holding with respect to analogous state conduct bore "some similarity to [the argument] rejected in *Indian Towing* . . ." *Id.* at 1290 n.3. The *Arvanis* Court rejected *Smith*'s simplistic approach and went on to consider whether the government had breached a duty owed to subcontractors under the applicable law of Illinois. With respect to the analogous conduct argument of *Smith*, the *Arvanis* court held:

> We think the syllogistic analysis assumes the answer to the question at issue. It should be possible to define governmental action in almost any situation narrowly enough to render it "uniquely governmental" (e.g., no private party could negligently drive a truck carrying U.S. Mail). The better approach is to focus on the behavior involved, not the legal labels applied, and then look for analogies with private conduct. For example, private parties in many situations are required by contract or by state law to obtain bonds - and often fail to do so.

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9 The decision of the district court (App. "A") is not clear as to whether it was a 12(b)(1) subject matter dismissal, or 12(b)(6) dismissal for failure to state a claim. As failure to state a claim under the FTCA deprives a federal court of subject matter jurisdiction, the two are functional equivalents in this case.

Id. at 1290.[10]

Unlike the *Arvanis* decision, the court below never addressed the apparent conflict between *Smith* and *Indian Towing*.[11] Accordingly, there is a conflict between *Smith* and its progeny and *Indian Towing* as well as a conflict between the Seventh Circuit (*Arvanis)* and the *Smith* line of cases.

Although it did not rely on *Indian Towing*, the decision of the Third Circuit in *JM Mechanical Corp. v. United States*, 716 F.2d 190 (3d Cir. 1983), recognized the potential for governmental liability when it failed in its duty to obtain proper bonding to the detriment of a relying subcontractor. In *JM Mechanical*, the United States Department of Housing and Urban Development (HUD) had been the insurer on the mortgage of a housing project. Under the pertinent regulations, HUD was charged with investigating and approving sureties for the mortgagor/contractor's payment and performance bonds. *See* 24 C.F.R. § 221.542 (1982).

Much like the case *sub judice*, it was another party's responsibility to acquire the bonds. HUD did, however, have a regulatory obligation to investigate the sureties. The bonds approved by HUD proved to be forgeries. HUD, however, knowingly allowed construction to continue unbonded. Prior to commencing work, JM Mechanical contacted the contractor about bonding and was informed

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10 It is particularly noteworthy that several states have imposed liability on their respective state or municipal governments when the general contractor fails to supply a proper bond on government owned construction projects. *See Green Elec. Sys. v. Metropolitan Airports Comm.*, 486 N.W.2d 819, 823 (Minn. App. 1992); *Atlanta v. United Electric Co.*, 202 Ga. App. 239, 414 S.E.2d 251, 253 (1991).

11 The *Arvanis* Court similarly rejected the *Smith* progeny of *McMann v. Northern Pueblos Enters.*, 594 F.2d 784 (10th Cir. 1979) and *Devlin Lumber & Supply Corp. v. United States*, 488 F.2d 88 (4th Cir. 1973). Contrary to *Arvanis*, the Ninth Circuit recently adopted the *Smith* position in *Westbay Steel Inc. v. United States*, 970 F.2d 648 (9th Cir. 1992). *See generally Carter v. United States*, 982 F.2d 1141, 1144 (7th Cir. 1992) (under *Indian Towing* government may be liable "for negligence in carrying out acts that no private person performs, because there are 'like' circumstances that lead to private liability").

that there were valid bonds, reviewed and approved by HUD. JM Mechanical then completed its work, but was not paid.

After securing a default judgment against the contractor (much like the case here), JM Mechanical filed a complaint against HUD. JM Mechanical alleged that HUD was "negligent in its investigation and verification of the payment and performance bonds, was negligent in the enforcement of its own regulations . . . and was negligent in failing to secure another surety bond or other assurances of payment as required by Federal Regulations." *Id.* at 192. In upholding the subcontractor's claim, the Court quoted JM Mechanical's characterization of HUD's negligence: "[W]e believe that HUD breached its responsibility of using due care on behalf of the contractors and therefore has violated the standard and made itself liable for the damages that have been incurred by [JM Mechanical]." *Id.*

The government argued that the claim was really an action for injuries resulting from a negligent misrepresentation by the government and barred under 28 U.S.C. § 2680(h), an exception to the FTCA for misrepresentations. The Court, noting the alleged reliance of the subcontractors, summarily rejected this argument:

> Thus JM alleges and the government admits that HUD had guaranteed the mortgage on the bonds. That guarantee, JM asserts, gave rise to the duty to secure valid bonds, which duty the government failed to perform. *That duty was owed to subcontractors who rely on the government to follow its own regulations for the protection of the subcontractors*. . . . Finally JM alleges that the government's negligent breach was the proximate cause of its injury.
>
> Thus JM has made a valid claim under the FTCA. While that claim might fail at trial . . . the District Court had subject matter jurisdiction over the claim and erred in granting the government's motion to dismiss under Fed.R.Civ.P. 12(b)(1).

Id. at 195 (emphasis supplied).

This action closely mirrors *JM Mechanical*. In both actions, the contractor relied upon the government's representation that appropriate bonding was in place. In fact, either no bonds were in place (*JM Mechanical*), or the bonds in place were worthless (this action). JM Mechanical relied on communications from the contractor, who in turn made representations about HUD. HUD's negligence was in failing to determine that the sureties met the requirements of the regulation and allowing the project to continue unbonded.

Similarly, a duty of care was owed to Hardaway and the other subcontractors that the Corps knew would be relying on the Corps to follow its own regulations and who foreseeably would be looking to the bonds for payment. This was the same duty HUD owed to JM Mechanical and the subcontractors on that project. The Corps' breach of its duty to follow its own regulations was substantially identical to HUD's breach.[12]

Although the greater wrong-doers were, perhaps, Ardavin and the two sureties, Hardaway is the party that should least be called upon to bear this loss. It is a long standing principle that where one of two persons must suffer loss, the loss should fall upon the person who, by reasonable diligence, could have prevented it. *See National Sav. Bank v. Creswell*, 100 U.S. 630, 643 (1879). In this action, Hardaway took the precaution of contacting the Corps to confirm that sureties had been investigated and were in place. (R2-5). Nothing short of conducting the investigation expressly required of the Corps, could have prevented this loss to Hardaway. The Corps was the party in the best position to prevent the loss and therefore, should bear its burden.

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12 For other examples of the Government having been negligent under the FTCA in the areas of investigation and construction see, *Block v. Neal*, 460 U.S. 289 (1983), (claims against the Farmers Home Administration for negligent inspection and supervision of construction of borrower's home cognizable under FTCA); *Seaboard Coast Line Railroad v. United States*, 473 F.2d 714 (5th Cir 1973). (Government liable for negligent design and construction of a drainage ditch, *Barron v. United States*, 473 F. Supp. 1077 (D. Hawaii 1979) (Government liable for failure to require subcontractor to comply with contract safety requirements), *aff'd in part, rev'd in part*, 654 F.2d 644 (9th Cir. 1981).

By dismissing this action, Hardaway has been denied the opportunity to prove that the Corps breached an express duty of care, as well as common law duties of due care. The scope of government's duty to obtain proper bonding under the Miller Act and its liability to contractors relying on the government to perform this duty has not been addressed by this Court. Moreover, most cases decided against subcontractors, like Hardaway, have relied upon the same uniquely governmental function exception expressly rejected by this Court. It is submitted that certiorari should be granted to resolve this issue.

CONCLUSION

As the extent of the government's liability in circumstances where it induces detrimental reliance in the performance of its duties has not been addressed by the Court, this Court should grant certiorari to resolve this issue. Moreover, the decisions of the circuit courts in *Smith* and its progeny, creating an apparent exception to FTCA liability, conflict with this Court's holding in *Indian Towing*. Finally, there is disagreement amongst the circuits as to whether the Miller Act constitutes a uniquely governmental function, precluding the application of the FTCA when the government fails to acquire or negligently approves Miller Act bonds.

Dated: May 25, 1993

Respectfully Submitted,

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Appendix to Petition

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE HARDAWAY COMPANY

Plaintiff,

v. Case No. 90-1210
-Civ-T-3A98(B)

UNITED STATES ARMY, DEPARTMENT
OF THE ARMY, CORPS OF ENGINEERS,

Defendant.

ORDER

Before the Court for its consideration is defendant's motion to dismiss the amended complaint. Upon due consideration, the motion is GRANTED.

C. Ardavin Construction, Inc. (C. Ardavin) contracted with the Corps of Engineers for the construction of roads at MacDill Air Force Base in Tampa, Florida and then executed a subcontract with plaintiff to provide the asphalt products for the construction project. After C. Ardavin failed to pay plaintiff monies due on the completed subcontract, plaintiff filed suit against C. Ardavin's individual sureties under the Miller Act, 40 U.S.C. §270a *et seq.*, and obtained a default judgment in the principal amount of $255,366.95 but has been unable to execute judgment. Plaintiff then filed the present suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§1346(b) and 2671 *et seq.*, against the United States. The amended complaint seeks damages in the amount of $255,366.95 and other relief.

Count I of the amended complaint alleges that the Corps and/or its contracting officer was negligent in failing to investigate the financial viability of C. Ardavin's individual sureties or was negligent in any investigation it undertook of the individual sureties, thereby violating both its statutory[1] and common law duties.

In subcontractor suits alleging the negligent failure of the United States or its officers to require a primary contractor to post a Miller Act bond, courts generally have held that there is no jurisdiction under the FTCA. *See United States v. Smith*, 324 F.2d 622 (5th Cir. 1963); *Arvanis v. Noslo Engineering Consultants, Inc.*, 739 F.2d 1287 (7th Cir. 1984); *McMann v. Northern Pueblos Enterprises, Inc.*, 594 F.2d 784 (10th Cir. 1979); *Devlin Lumber & Supply Corp. v. United States*, 488 F.2d 88 (4th Cir. 1973); *but see J. M. Mechanical Corp. v. United States*, 716 F.2d 190 (3d Cir. 1983) (subcontractor on construction project stated claim under FTCA for HUD's negligent failure to investigate and verify payment and performance bonds, negligence enforcement of its regulations, negligent failure to notify subcontractors that bonds had been declared counterfeit and negligent in failing to secure another security bonds or other assurances of payment).

Section 1346(b) of the FTCA waives the sovereign immunity of the United States for injuries

> caused by the negligent or wrongful act oromission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

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[1] Title 48 C.F.R. 28.203(a) provides in pertinent part that "[t]he contracting officer shall determine the acceptability of individuals proposed as sureties, and shall ensure that the surety's pledged assets are sufficient to cover the bond obligation."

In *Smith*,[2] the Fifth Circuit Court of Appeals reasoned that, as the Miller Act deals exclusively with federal contracts, private persons would never be in a position to require the posting of a Miller Act bond by a contractor and so could not be liable for any negligent failure to insist on the posting of such a bond. Therefore, the Court concluded, since a private person could not be liable for such failure, the United States could not be under the provisions of the FTCA. *Id.* at 624-25. The Court explained that the FTCA was not intended to redress breaches of federal statutory duties and was concerned primarily with providing redress for the garden variety common-law torts recognized by state law. *Id.* at 625. Such reasoning is applicable to the amended complaint presently before this Court. Nor, in any event, has plaintiff provided the Court with any persuasive analogy that would make it conclude that a private cause of action, similar to this one, exists under the law of the state of Florida, thus enabling plaintiff to maintain its FTCA claim against the United States. Finally, the Court observes that to allow plaintiff to sue under the FTCA would allow plaintiff "to achieve by indirection a result that [it] could not reach directly under the Miller Act." *Arvanis*, 739 F.2d at 1292. While the result to the sureties may be unjust, the problem is one for Congress to address.

Count II of the amended complaint seeks the imposition of a constructive trust of any funds retained by the United States owing on the contract with C. Ardavin. The Court finds that plaintiff lacks standing to sue the United States for any compensation due it under its subcontract with C. Ardavin. *See Arvanis*, 739 F.2d at 1292-93; *United Electric Corp. v. United States*, 647 F.2d 1082 (Ct.Cl.), *cert. denied*, 454 U.S. 863 (1981). The Court notes, finally, the comment of the Claims Court in *United Electric Corp.*:

> As we have done before, we stress that the United States may voluntarily choose to make payment, . . . and we believe that it has a nonenforceable obligation to do so, when and if it becomes clear that [the subcontractor] had a valid claim, that

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2 In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

> contract retainages or other unexpended funds under the contract are available for such payment, and that, if those funds are not paid out, the Government will be receiving a windfall which it should not have."

Id. at 1087.

Upon due consideration and for the reasons stated, the Court finds that this action is not cognizable under the FTCA and that plaintiff lacks standing to sue for the imposition of a constructive trust. Accordingly, the motion to dismiss filed by the United States is GRANTED, and this case is DISMISSED.

DONE AND ORDERED in Chambers, in Tampa, Florida, this 11th day of April 1991.

/s/ William Castagna
UNITED STATES
DISTRICT JUDGE

United States Court of Appeals,
Eleventh Circuit
January 13, 1993[1]

No. 91-3435

The Hardaway Company,
Plaintiff-Appellant,

v.

United States Army Corps of Engineers,
Defendant-Appellee

Appeal from the United States District Court for the
Middle District of Florida

Before TJOFLAT, Chief Judge ANDERSON, Circuit Judge, and ALAIMO*, Senior District Judge (Hon. Anthony A. Alaimo, Senior U.S. District Judge for the Southern District of Georgia, sitting by designation.)

PER CURIAM:

The Hardaway Company (Hardaway), a subcontractor on a government construction project, appeals from the dismissal of its complaint seeking recovery from the government under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-80 (1988), for the balance due under its subcontract. We agree with the district court that Hardaway could not bring this claim under the FTCA and, accordingly, we affirm.

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1 Reported at 980 F.2d 1415.

I.

In July 1986, C. Ardavin Construction, Inc., (Ardavin) entered a general construction contract with the United States Corps of Engineers (Corps) to build a road at MacDill Air Force Base in Tampa, Florida. Before construction began, Ardavin posted the payment and performance bonds required by the Miller Act, 40 U.S.C. §§ 270a-d (1988). Two individuals acted as the sureties for Ardavin's bonds.

In January 1988, Hardaway, relying on the Corps' acceptance of these individuals as Ardavin's sureties, entered into a subcontract with Ardavin to perform the paving work portion of Ardavin's contract with the Corps. Hardaway thereafter performed the subcontract, but did not get paid. Apparently Ardavin had become insolvent. In an effort to recover the subcontract price, Hardaway sued Ardavin's sureties under the Miller Act. The sureties did not defend the case and Hardaway obtained a default judgment against them. Hardaway has been unable to obtain satisfaction of its judgment because it cannot locate the sureties or any of their assets.

Hardaway turned to the FTCA for relief and brought this case against the Corps in the United States District Court for the Middle District of Florida. Hardaway claimed that the Corps negligently investigated the financial worth of the sureties as required by government acquisition regulations. *See* 48 C.F.R § 28.202-2(a)(1986).[2] Following the rule announced in *United States v. Smith*,

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[2] The version of the regulation in effect at the time of the underlying conduct, 48 C.F.R. § 28.202-2(a)(1986), provides that:

> Individual sureties are acceptable for all types of bonds except position schedule bonds. The contracting officer shall determine the acceptability of individuals proposed as sureties. At least two individual sureties must execute the bond and the net worth of each individual must equal or exceed [the] penal amount of the bond. Contracting officers shall consider the number of amounts of other bonds upon which a proposed individual surety is bound, and the status of the contracts for which such bonds were furnished, in determining the acceptability of the individual surety . . ..

324 F.2d 622 (5th Cir. 1963),[3] the district court found that Hardaway could not state a claim under the FTCA and granted the Corps' motion to dismiss. Hardaway then appealed.

II.

The FTCA describes government waiver of sovereign immunity for claims brought by those who are injured by tortious government action. It provides that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . .." 28 U.S.C. § 2674.

The *Smith* court held that an unpaid subcontractor on a government project could not recover under the FTCA for the general contractor's failure to post a payment bond under the Miller Act. 324 F.2d at 625. The court stated that the government could not be positioned "as a private individual under like circumstances." *Id.* at 624. Simply, *Smith* held that because there is no private analogy to subcontractor claims against the government alleging a contractor's failure to procure a Miller Act bond, the government may not be found liable under the FTCA. *Id.* at 625.[4] *Smith* clearly applies to the instant case. Because there is no analogous private right of action

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Section 28.202-2 has since been significantly modified. *See* 48 C.F.R. § 28.203 (1991).

3 In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

4 Three other circuits that have faced similar claims that Miller Act bonds were not obtained or were insufficient have followed *Smith's* rationale. *See Westbay Steel, Inc. v. United States*, 970 F.2d 648, 650 (9th Cir. 1992); *McMann v. Northern Pueblos Enters., Inc.*, 594 F.2d 784, 785-86 (10th Cir. 1979); *Devlin Lumber & Supply Corp. v. United States*, 488 F.2d 88, 89 (4th Cir. 1973); *cf. Arvanis v. Noslo Eng'g Consultants, Inc.*, 739 F.2d 1287, 1290-92 (7th Cir. 1984), *cert. denied*, 469 U.S. 1191, 105 S.Ct. 964, 83 L.Ed. 2d 969 (1985) (Subcontractor could not state a claim under the FTCA for the government's failure to ensure that a payment bond was posted). *But see JM Mechanical Corp. v. United States*, 716 F.2d 190, 196-97 (3d Cir. 1983) (subcontractor made a valid claim under the FTCA for the government's failure to procure replacement bonds).

for failing to investigate a surety on a Miller Act bond, Hardaway cannot maintain an action against the Corps under the FTCA.

Hardaway contends that *Smith* and similar cases in the other circuits are distinguishable from this case. It argues that the subcontractors in those cases claimed that the government was negligent in failing to require a contractor to post a Miller Act bond. The Miller Act, Hardaway claims, requires contractors to post bonds, but does not require the government to demand that bonds be posted. 40 U.S.C. § 270a(a).[5] Hardaway contends that this case is different because here the government had an affirmative duty under 48 C.F.R. § 28.202-2(a) to investigate the financial worth of the surety, and therefore an action under the FTCA may be maintained. We disagree.

Even if there is merit to Hardaway's argument that the government breached its duty to investigate, *Smith* preserves the government's sovereign immunity. There the court stated that the FTCA "simply cannot apply where the claimed negligence arises out of the failure of the United States to carry out a statutory duty in the conduct of its own affairs." *Smith*, 324 F.2d at 624-25. Obviously, a contracting officer should not approve a contract under the Miller Act without ensuring that an adequate surety bond exists. *See* 40 U.S.C. § 270a(a). The dictates of the regulation in 48 C.F.R. § 28.202-2(a), therefore, do not alter the government's basic obligations and should not increase its liability. *Smith* establishes that the government cannot be held liable under the FTCA when no bond exists. It would be perverse to hold that the government can be liable under the FTCA when a bond does exist, but proves to be inadequate. *See Westbay Steel, Inc., v. United States*, 970 F.2d 648, 650 (9th Cir. 1992) ("[B]ecause liability is inappropriate when the United States approves a contract without a bond, the approval of a contract with an inadequate bond is likewise not actionable.").[6]

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5 40 U.S.C. § 270a(a) provides that "[b]efore any contract, exceeding $25,000 in amount, . . . is awarded to any person, such person shall furnish to the United States the following bonds. . . ."

6 Hardaway contends that this result necessarily depends upon the "unique governmental functions" exception to the FTCA that the Supreme Court disallowed in *Indian Towing Co. v. United States*, 350 U.S. 61, 64, 76 S.Ct. 122, 124, 100 L.Ed. 48 (1955). In light of the precedential force of *Smith*, as well as the persuasive authority of *Devlin*, *Arvanis*, and *McMann*, this argument must fail.

We thus hold that a subcontractor may not state a claim under the FTCA for the negligent failure to investigate the assets of a surety. Any other result would permit subcontractors to achieve "by direction a result they could not reach directly under the Miller Act." *Id.* at 651 (quoting *Arvanis*, 739 F.2d at 1292). The district court correctly dismissed Hardaway's complaint.[7]

III.

For the foregoing reasons, we find that Hardaway cannot recover against the government under the FTCA for its alleged negligence in investigating the financial worth of the individual sureties. Subcontractors may not circumvent the Miller Act by seeking payment from the government under the FTCA. Accordingly, the judgment of the district court dismissing Hardaway's amended complaint with prejudice is affirmed.

AFFIRMED.

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7 Hardaway also appeals the district court's refusal to impose a constructive trust on any funds the Corps retained for Ardavin. A subcontractor does not have standing under the FTCA to sue for the retainage. *See Arvanis*, 739 F.2d at 1292-93; *United Elec. Corp. v. United States*, 647 F.2d 1082, 1083-84 (Ct.Cl.), *cert. denied*, 454 U.S. 863, 102 S.Ct. 322, 70 L.Ed.2d. 163 (1981). Any other result would subvert the Miller Act and would be "just the sort of direct raid on the treasury" that warrants sovereign immunity. *Arvanis*, 739 F.2d at 1292. Because we find that Hardaway's claim was property dismissed, we need not reach his other arguments.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT[1]

No. 91-3435

THE HARDAWAY COMPANY,

Plaintiff-Appellant,

versus,

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING
(January 13, 1993)

BEFORE TJOFLAT, Chief Judge, ANDERSON, Circuit Judge, and ALAIMO,* Senior District Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellant,

THE HARDAWAY COMPANY, is DENIED.

ENTERED FOR THE COURT:

/s/ Tjoflat, Circuit Judge
United States Circuit Judge

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1 Original stamped as filed February 25, 1993

* Honorable Anthony A. Alaimo
Senior U.S. District Judge
for the Southern District of Georgia,
sitting by designation.

Excerpts from The Federal Tort Claims Act

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the

claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

(As amended Nov. 18, 1988, Pub.L. 100-694,§§ 4, 9(c), 102 Stat. 4564, 4567.)

The Miller Act, In Pertinent Part

§ 270a. Bonds of contractors of public buildings or works

(a) Type of bonds required

Before any contract, exceeding $25,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) Waiver of bonds for contracts performed in foreign countries

The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and

payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Authority to require additional bonds

Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

(d) Coverage for taxes in performance bond

Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under Title 26. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such suit shall be commenced after the expiration of one year after the day on which such notice is given.

(Aug. 24, 1935, c. 642,§ 1, 49 Stat. 793; Nov. 2, 1966, Pub.L. 89-719, title I,§ 105(b), 80 Stat. 1139; Nov. 2, 1978, Pub.L. 95-585, 92 Stat. 2484.)